UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal No. 16-60231
(Case No. 1:13-cv-00214-SA-SAA (N.D. Miss.))

NICOLE MABRY, as Mother and Next Friend of T.M., A Minor,

Plaintiff-Appellant,

v.

LEE COUNTY,

Defendant-Appellee.

Appeal from the Final Judgment in the United States
District Court for the Northern District of Mississippi,
the Hon. Sharion Aycock, Presiding

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST AND IDENTITY OF AMICUS[1]

Amicus Curiae Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare, criminal, and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that the juvenile justice system considers the unique developmental differences between youth and adults. Juvenile Law Center has worked extensively on the issue of juvenile strip searches, including filing *amicus* briefs in *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009), *T.S. v. Doe*, 742 F.3d 632 (6th Cir. 2014), and *Smook v. Minnehaha Cnty.*, 457 F.3d 806 (8th Cir. 2006), and serving as counsel on the petition for writ of certiorari before the U.S. Supreme Court in *J.B. v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1462 (Mar. 21, 2016) (No. 15-903).

[1] All parties have consented to this filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amicus Curiae*, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. *Amicus Curiae* file under the authority of Fed. R. App. P. 29(a).

SUMMARY OF THE ARGUMENT

The district court in this case incorrectly held that the suspicionless body cavity search of a 12-year-old girl detained for a minor offense is a reasonable search under the Fourth Amendment. Although the Supreme Court approved such searches for adult detainees in *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012), the Court has consistently recognized that children cannot be viewed simply as miniature adults, and that their developmental characteristics must be considered when assessing the scope and breadth of their constitutional rights. The district court failed to follow that well-established principle, and instead mechanically applied the *Florence* standard for strip searches of adults in jail to assess the reasonableness of strip searches of children in juvenile detention. This wholesale adoption of an adult standard to determine the Fourth Amendment rights of children fails to account for T.M.'s youthfulness, as required by Supreme Court precedent, and impermissibly equates juvenile detention with adult jail.

Rather than expanding the *Florence* holding to cover children, the district court should have simply engaged in the standard Fourth Amendment analysis, balancing the need for the search against the invasion of privacy that the search entails. Strip searches of children are an exceptional invasion of privacy that can cause lasting harm. This intrusion cannot be justified by the cited governmental interests. Although juvenile detention facilities have legitimate safety and security

interests, the suspicionless body cavity search of a child goes far beyond the scope necessary to protect those interests, and thus violates the Fourth Amendment's prohibition on unreasonable searches.

ARGUMENT

I. Children are Entitled to Special Constitutional Protections

That children are "different" is a principle that permeates our law. Time and again, the Supreme Court has reminded us of what every parent knows: that "youth is more than a chronological fact"—it is a "time and condition of life" marked by particular behaviors, perceptions, and vulnerabilities. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011). The "distinctive attributes of youth" have well-established legal significance. *See Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012); *see also J.D.B.*, 564 U.S. at 274 ("'[O]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults.") (quoting *Eddings*, 455 U.S. at 115-116). As Justice Frankfurter so aptly articulated more than a half-century ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Following that basic principle, the Supreme Court has repeatedly emphasized that children's developmental characteristics must be considered in measuring the scope and breadth of their constitutional rights.

The Supreme Court's emphasis on the legal relevance of adolescent development spans a diverse array of constitutional contexts. Over the past decade, the Court has repeatedly highlighted the relevance of adolescent status to constitutional standards relating to culpability and sentencing. *See Miller v. Alabama*, 132 S. Ct. at 2475 (striking down mandatory imposition of life without parole sentences for juveniles); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking down life without parole sentences for juveniles convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (striking down the juvenile death penalty as unconstitutional). These cases focus on three key characteristics that distinguish adolescents from adults: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). Highlighting these features of adolescence, the Supreme Court recently reiterated the principle that "children are constitutionally different from adults for purposes of sentencing." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (holding *Miller* retroactiveon collateral review).

Age and maturity also play a role in determining the scope of the Fifth Amendment protection against self-incrimination. In *J.D.B. v. North Carolina*, the

Supreme Court rejected the argument that "a child's age has no place" in the analysis of whether a minor felt free to leave or halt an interrogation. 564 U.S. at 271-72. Recognizing that children "'are more vulnerable or susceptible to … outside pressures' than adults," the Court instead adopted a "reasonable child" standard for determining the scope of the *Miranda* protections. *Id*. at 272 (quoting *Roper*, 543 U.S. at 569). Similarly, the Court has articulated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (concluding a fourteen-year-old boy's statement was involuntary); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (noting that teenagers cannot be "judged by the more exacting standards" applied to adults); *see also In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that [a minor's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.").

The Supreme Court's more protective treatment of children is also evident in its First Amendment jurisprudence. For example, the Court has applied a different obscenity standard to cases involving children, recognizing that exposure to obscenity may be harmful to minors even when it would not harm adults. *Ginsburg v. New York*, 390 U.S. 629, 638 (1968); *see also Denver Area Educ. Telecomm.*

Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (upholding a statute regulating obscene programming on cable TV in part because of "[t]he importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex"). Similarly, the Court has emphasized children's lack of maturity and susceptibility to social pressure when determining whether prayers at public high school graduation ceremonies violate the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 593 (1992). The special consideration of youth in these cases reinforces the longstanding proposition that legal standards developed for adults cannot be "uncritically transferred" to children. *See, e.g.*, *May*, 345 U.S. at 536 (Frankfurter, J., concurring); *see also McKeiver v. Pennsylvania*, 403 U.S. 528, 545-47 (1971) (noting children's malleability and developmental status when declining to extend the right to jury trials to juvenile court).

Of particular relevance to this case, the Supreme Court has considered age to be a significant factor in assessing the reasonableness of a strip search. In *Safford v. Redding*, the Court relied upon the unique vulnerability of adolescents, and their heightened expectation of privacy, to hold a suspicionless strip search unconstitutional in the school context. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009). The Court in *Safford* grounded its Fourth Amendment reasonableness analysis in the special context of juvenile expectations, explaining that a student's expectation of privacy "is indicated by the consistent experiences

of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Id.* at 375. It further identified the "*categorically extreme* intrusiveness of a search down to the body of an adolescent," *id.* at 376 (emphasis added), even when the student was not required to completely undress, *id.* at 369. In light of that extreme level of intrusion, the Court held that "some justification in suspected facts" was needed to conduct the search. *Id.* at 376.

In short, the Supreme Court has consistently recognized that children deserve special protections because of their unique developmental status, and it has done so specifically in the context of juvenile strip searches.

II. The District Court Erred in Extending the Supreme Court's Holding in *Florence* to Cover Juvenile Detainees

Despite consistent statements from the Supreme Court that children are entitled to special protection under the Constitution, the district court in this case applied the *Florence* standard for strip searches of adults in jail to assess the reasonableness of strip searches of children in juvenile detention. *See Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012). This wholesale adoption of an adult standard to determine the Fourth Amendment rights of children is fatally flawed for at least two reasons: it fails to account for T.M.'s youthfulness, and it impermissibly equates juvenile detention with adult jail.

A. *Florence* Did Not Consider the Impact of Youthfulness on the Constitutional Standard

As discussed at length above, the "distinctive attributes of youth" are highly relevant to determining the scope of children's constitutional protections. *See, e.g.*, *Montgomery*, 136 S. Ct. at 733. Indeed, in *Graham v. Florida*, the Supreme Court wrote that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 560 U.S. at 76. Yet here, the district court crafted a rule that does just that, exporting the holding in a case involving adult inmates to apply to the body cavity search of a 12-year-old girl, with minimal consideration of the effect her age and maturity might have on the reasonableness of the search.

The Supreme Court's decision in *Florence* addressed the reasonableness of a suspicionless strip search of an adult male who was arrested pursuant to an outstanding warrant and confined at two adult correctional facilities before being released. 132 S. Ct. at 1514-15. Applying the deferential *Turner v. Safley* standard applicable in adult prison cases, the Court held that the strip search policy at issue was "reasonably related to legitimate penological interests," and thus passed constitutional muster. *Florence*, 132 S. Ct. at 1515 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Citing evidence in the record of weapons, drugs, and other contraband that adult detainees had smuggled into correctional facilities, the Court concluded that the petitioner had not met his burden of providing "substantial evidence" demonstrating that the officials' "response to the situation [was]

exaggerated." *Id.* at 1518.

The *Florence* decision made no mention of children, nor did it describe how its reasoning might apply when a 12-year-old is taken to a juvenile facility for fighting at school. The Supreme Court simply had no occasion to consider those facts. Moreover, none of the cases relied upon by the Court in *Florence* involved children or took into account juvenile status. The *Turner v. Safley* decision, as well as the precedent it built upon, all concerned the constitutional rights of incarcerated *adults*. *See Turner*, 482 U.S. at 86-90 (citing *Pell v. Procunier*, 417 U.S. 817 (1974) (holding that prohibitions on prisoners' initiating interviews by press did not violate the prisoners' rights); *Block v. Rutherford*, 468 U.S. 576 (1984) (upholding a jail's policy denying pretrial detainees contact visits and conducting random searches of cells); *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding constitutional body cavity searches of pretrial detainees following contact visits); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (holding that bans on inmate solicitation and group meetings were rationally related to reasonable objectives of prison administration).

The district court concluded that "nothing" suggests the inquiry should be any different for children, despite a half-century of Supreme Court precedent to the contrary. *See* Electronic R. on Appeal, Mem. Op., Mar. 9, 2016, at 1255, ECF No. 121 ("Nothing suggests that this contextualized inquiry should operate differently

when the detainee is a juvenile."). This type of "uncritical[] transfer[]" of an adult standard to determine the rights of children is precisely the "fallacious reasoning" Justice Frankfurter warned about. *See May*, 345 U.S. at 536 (Frankfurter, J., concurring). Common sense tells us that "a 7-year-old is not a 13-year-old and neither is an adult," *see J.D.B.*, 564 U.S. at 280, and that these age differences matter in assessing the reasonableness of a body cavity search. The district court's holding requires us to suspend our commonsense understandings of the impact of age and maturity and view children "simply as miniature adults"—something the Supreme Court has repeatedly counseled against when determining the constitutional protections due children. *See Miller*, 132 S. Ct. at 2470; *J.D.B.*, 564 U.S. at 274.

B. Juvenile Detention Facilities Cannot Be Equated to Adult Jails

A second error in the district court's wholesale adoption of the *Florence* standard is that it impermissibly equates juvenile detention centers with adult jails. The Supreme Court has recognized that, while the primary purpose of the adult criminal justice system is to determine guilt and impose punishment, the juvenile system has core goals of rehabilitation and individualized treatment. *See McKeiver*, 403 U.S. at 550 (explaining that equating the juvenile justice system with the adult criminal justice system ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates"). Juvenile

detention centers are distinct from adult jails, *see Schall v. Martin*, 467 U.S. 253, 265-68 (1984), because they focus on individualized responses, and the care and education of youth in their custody. *See e.g.*, Kathleen A. Baldi, *The Denial of a State Constitutional Right to Bail in Juvenile Proceedings: The Need for Reassessment in Washington State*, 19 SEATTLE U. L. REV. 573, 583 (1996) ("Although a child's detention may have the same practical effect upon his freedom as does the confinement of an adult, the child's confinement is for his own welfare. In contrast, the pre-trial confinement of an adult criminal defendant is used solely to ensure his presence at trial.").

Moreover, young people may be held in detention for such minor misconduct as violating curfew, running away from home to escape abuse, and engaging in other typical adolescent behavior such as underage drinking, skipping school, or—as in this case—getting into a fight with a classmate. *See, e.g.*, *Smook v. Minnehaha Cnty.*, 457 F.3d 806, 808 (8th Cir. 2006) (considering the constitutionality of strip searches of minors detained for curfew violations); *N.G. v. Connecticut*, 382 F.3d 225, 227 (2d Cir. 2004) (considering the constitutionality of strip searches for juveniles in detention for various minor offenses). Indeed, recognizing that juvenile detention centers are fundamentally different from adult jails, Mississippi—like most states—places strict statutory limits on the circumstances under which a juvenile offender may be detained at an adult jail,

even for very limited periods of time. *See* Miss. Code Ann. § 43-21-301(6). Such legal distinctions reflect that the nature and purposes of juvenile detention are not comparable to those of adult jails.

III. Under Existing Fourth Amendment Jurisprudence, Suspicionless Body Cavity Searches of Children Detained for Minor Offenses are Unconstitutional

Rather than crafting new constitutional jurisprudence by expanding the *Florence* holding to cover children, the district court here should simply have engaged in the standard Fourth Amendment analysis. Under the well-established balancing test for assessing the reasonableness of a search, a suspicionless body cavity search of a 12-year-old child detained for a minor offense violates the Constitution.

As the Supreme Court has repeatedly explained, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Where the requirement of a warrant and probable cause are not required due to the exigencies of the circumstances, courts must "determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests." *See Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002). There is no "mechanical way" to determine whether an intrusion on privacy is reasonable; rather, "[t]he need for a particular search must

be balanced against the resulting invasion of personal rights." *Florence*, 132 S. Ct. at 1516.

At issue here is the constitutionality of a search that was not based on any individualized suspicion. The category of constitutionally permissible suspicionless searches is "closely guarded," *Chandler v. Miller*, 520 U.S. 305, 309 (1997), and "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)). "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available" to protect against abuse. *T.L.O*, 469 U.S. at 342 n.8. Indeed, the majority of suspicionless searches upheld by the Supreme Court have been drug tests in which the Court has characterized the intrusion of privacy as minimal or even "negligible." *See, e.g.*, *Earls*, 536 U.S. at 833; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). The Supreme Court has never approved a suspicionless strip search of a child, nor has the Fifth Circuit. *See, e.g.*, *Safford*, 557 U.S. at 368 ("Because there were no reasons to suspect the drugs . . . were concealed in [a student's] underwear, we hold that the search did violate the

Constitution[.]"); *Roe v. Texas Dep't Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002) (concluding that a child protective services worker "must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile").

Even in the very limited contexts where suspicionless searches have been condoned, courts still must assess the reasonableness of the search by balancing the need for the search against the invasion of personal rights that the search entails. As the Supreme Court explained in *Bell v. Wolfish*—a case that upheld suspicionless strip searches of adult inmates after contact visits—courts must determine the reasonableness of a search by considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." 441 U.S. at 559. The *Florence* decision reinforced that balancing test, noting that "[t]he Court's opinion in *Bell v. Wolfish* . . . is the starting point" for the Fourth Amendment analysis in the prison context. *See Florence*, 132 S. Ct. at 1516 (citation omitted). Thus, contrary to the district court's rejection of that "fact-specific balancing" test, any assessment of the reasonableness of a search, whether based on individualized suspicion or not, must weigh the need for the search against the nature of the intrusion. *See* ROA.1255.

The search at issue does not pass that test. A body cavity search of a child—without any suspicion that the child may be hiding weapons, drugs, or contraband—is an exceptionally intrusive invasion of privacy. Indeed, even less invasive strip searches than the one at issue here can be highly traumatic experiences for children and teenagers. Although juvenile detention facilities have legitimate safety and security interests, subjecting a 12-year-old with no history of drug use or weapon possession to a close visual inspection of her rectal cavity goes far beyond the scope necessary to protect those interests.

A. Body Cavity Searches Are Extremely Intrusive, Especially for Children

"It is axiomatic that a strip search represents a serious intrusion upon personal rights." *Justice v. City of Peachtree City*, 961 F.2d 188, 192-93 (11th Cir. 1992); s*ee also U.S. v. Mendenhall*, 446 U.S. 544, 574 (1980) (White, J., dissenting). Being forced to remove your clothing and expose the most private areas of your body to close visual inspection by a stranger can be frightening, demeaning, and degrading—for anyone, regardless of age. *See Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (strip searches are "terrifying"); *Justice*, 961 F.2d at 192 ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening") (quoting *Does v. Boyd*, 613 F. Supp. 1514, 1522 (D. Minn. 1985); *see also Thompson v. City of Los*

Angeles, 885 F.2d 1439, 1446 (9th Cir. 1989) (strip searches produce "feelings of humiliation and degradation"), *overruled on other grounds by Bull v. City and Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"). In light of this high level of intrusiveness, the Supreme Court has stated that body cavity searches of the type at issue here "instinctively give[] us the most pause." *Bell*, 441 U.S. at 558.

For children, the harm caused by a strip search can be significantly more severe. *See generally* Anne C. Peterson & Brandon Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaption*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY (Joseph Adelson ed., 1980). Because adapting to physical maturation is a key psychological task of adolescence, teenagers tend to be more self-conscious about their bodies than those in other age groups. *See id.* at 144; *see also* Edward Clifford, *Body Satisfaction in Adolescence*, *in* ADOLESCENT BEHAVIOR AND SOCIETY: A BOOK OF READINGS 53 (Rolf E. Muuss ed., 3d ed. 1980). With the onset of puberty, normal teenagers begin to view their bodies critically, and compare them to those of their peers and their images touted through popular and social media, making adolescents particularly vulnerable to

embarrassment. *See* F. Philip Rice & Kim Gale Dolgin, *The Adolescent: Development, Relationships and Culture* 168 (Karen Bowers ed., 11th ed. 2005).

This increased self-consciousness among youth creates a heightened sensitivity to invasions of privacy. Adolescents' well-known preoccupation with body image is actually a critical part of their development; it is part and parcel of the job of obtaining autonomy from the family and "assum[ing] the role of an adult in society." William A. Rae, *Common Adolescent-Parent Problems*, *in* HANDBOOK OF CLINICAL CHILD PSYCHOLOGY 555 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992). Thus, for an adolescent, privacy is a "marker of independence and self-differentiation." Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible*?, 62 NEB. L. REV. 455, 488 (1983); *see generally* Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998). If the child's privacy is threatened, the resulting stress can seriously undermine the child's self-esteem. *See* Rae, *supra*, at 561 (noting the importance of confidentiality when working with adolescents); Rice & Dolgin, *supra*, at 180 (noting the negative impact of stress upon self-esteem and adolescent development).

Indeed, research has shown that the extreme invasion of privacy inherent in a strip search can be particularly harmful to children, and can even cause lasting

trauma. Due to adolescents' heightened concern for privacy, "a child may well experience a strip search as a form of sexual abuse." Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991); *see also* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 520-21 (2005) (explaining that children subjected to strip searches may experience the searches as sexual violence). The inherent power differential present when an adult authority figure searches a child also makes it more likely that a child will experience the search as an aggressive act. *See* Jacqueline Hough, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 69 S. CAL. L. REV. 855, 863, 870 (1996). Researchers have concluded that strip searches can lead children to experience years of anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars. *See* Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 929 (1997) (describing lasting and debilitating psychological effects of a school's strip search of a student); *see also* Coleman, *supra*, at 520-21 (noting that searches that would violate the Fourth Amendment for adults cause children to suffer "trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-

doubt, depression and isolation"). Thus, the "profound irony" of protecting children by allowing them to be searched is that, in many instances, the search itself *inflicts, rather than mitigates*, trauma. Coleman, *supra*, at 417.

Worse still, the vast majority of children in the juvenile justice system arrive burdened with histories of exposure to traumatic events, compounding the psychological damage from strip searches and rendering it even more devastating. Conservative estimates suggest that three out of four children in the juvenile justice system have suffered from childhood trauma. *See* Julian D. Ford et al., *Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions*, 57 JUV. & FAM. CT. J. 13, 13 (2006). In some studies, upwards of 90% of juvenile detainees reported a history of traumatic experiences. *See* Gordon R. Hodas, Penn. Off. of Mental Health & Substance Abuse Servs., *Responding to Childhood Trauma: The Promise and Practice of Trauma Informed Care* 17 (2006) ("In one study of juvenile detainees, 93.2% of males and 84% of females reported having a [previous] traumatic experience."); Carly B. Dierkhising, et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, European J. Psychotraumatology 1, 6 (2013) (finding up to 90% of justice-involved youth report exposure to multiple trauma types). As a consequence of significant exposure to traumatic events, large numbers of children in the juvenile

justice system suffer from posttraumatic stress disorder (PTSD) and other stress-related disorders. Juv. Just. Working Group, Nat'l Child Traumatic Stress Network, *Trauma Among Girls in the Juvenile Justice System* (2004) [hereinafter *Trauma Among Girls*].[2] If these youth are retraumatized by their experiences in the juvenile justice system, the effects can be cumulative, leading to "more severe and chronic posttraumatic stress reactions and other developmental consequences." Nat'l Child Traumatic Stress Network, *Understanding Child Traumatic Stress*, http://www.nctsn.org/resources/audiences/parents-caregivers/understanding-child-traumatic-stress (last visited May 23, 2016) [hereinafter "NCTSN Trauma Report"]; *see also* Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 Archives Gen. Psychiatry 403, 410 (2004) (explaining that "[s]ymptoms of PTSD may be exacerbated by such common practices as handcuffs and searches").

Not only are youth more likely to be traumatized by a strip search than

[2] "Rates of PTSD among youth in juvenile justice settings range from 3 percent in some [studies] to over 50 percent in others. These rates are up to eight times as high as [those] in community samples of similar-age peers." *Trauma Among Girls*, *supra*, at 3 (citations omitted). In one study of incarcerated boys, over thirty percent presented symptoms of PTSD. *See* Elizabeth Cauffman et al., *Posttraumatic Stress Disorder Among Female Juvenile Offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1209, 1213 tbl.1 (1998). Rates of PTSD are even higher for girls in the juvenile justice system, as one study of incarcerated girls found that over sixty-five percent had experienced PTSD at some time in their lives. *See id*. at 1212.

adults, traumatic experiences affect them in a fundamentally different way. Research has shown that early traumas can disrupt critical aspects of brain and personality development, leading to long-term health consequences. *See* Julian D. Ford et al., *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, National Center for Mental Health and Juvenile Justice 1 (2007); *see also* Ruth Gerson & Nancy Rappaport, *Traumatic Stress and Posttraumatic Stress Disorder in Youth: Recent Research Findings on Clinical Impact, Assessment, and Treatment*, 52 J. Adolescent Health 137 (2013) ("[T]raumatic experiences in childhood lead to a greater risk of psychiatric, cardiac, metabolic, immunological, and gastrointestinal illness later in life."). The widely publicized "Adverse Childhood Experiences (ACE) Study" has shed light on just how profound the effects of early traumas can be, showing a strong relationship between exposure to childhood traumas and multiple risk factors for several of the leading causes of death in adults, including heart disease, cancer, chronic lung disease, and liver disease. *See* Vincent J. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, American Journal of Preventive Medicine, Vol. 14, Issue 4, at 245-258 (May 1998).

Many courts, including the Fifth Circuit, have acknowledged that children are at increased risk of harm from intrusive searches. For instance, the Fifth Circuit

has noted that it "does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude." *Roe*, 299 F.3d at 406. Similarly, the Eleventh Circuit has agreed that children "are especially susceptible to possible traumas from strip searches." *Justice*, 961 F.2d at 192-93 (citations omitted); *see also Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search was particularly intrusive on sixteen year old, because at that age "children are extremely self-conscious about their bodies"); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (strip search of a thirteen-year-old was a "violation of any known principle of human decency"). The Supreme Court has been particularly sensitive to children's risk of psychological harm, acknowledging in *Safford* that strip searches are highly intrusive, and that "adolescent vulnerability intensifies the exposure's patent intrusiveness." 557 U.S. at 366; *see also Eddings*, 455 U.S. at 115 (noting that youth are "most susceptible to influence and to psychological damage").

The strip search at issue in this case goes far beyond the one the Supreme Court held unconstitutional in *Safford*. The student in that case was required to strip to her bra and underwear, and then "pull out" her undergarments, "exposing her breasts and pelvic area to some degree." *Safford*, 557 U.S. at 369. Here, T.M. was forced to remove all of her clothes—including undergarments—and then bend

over, spread her buttocks, and cough, exposing the rectal cavity for visual inspection. Although any strip search of a child can be traumatizing, the search of T.M. was particularly intrusive.

B. The Severe Intrusion and Potential Trauma of the Search Outweigh the Governmental Interests at Stake

Under the Fourth Amendment balancing test, the next task for the court is to determine whether that exceptional invasion of privacy was needed to achieve a legitimate government interest. *See Florence*, 132 S. Ct. at 1516 ("The need for a particular search must be balanced against the resulting invasion of personal rights."). Although juvenile detention facilities certainly have legitimate safety and security interests, the search at issue here goes far beyond the scope necessary to protect those interests, and thus cannot be considered "reasonable" under the Fourth Amendment.

As discussed above, the body cavity search of T.M. was not based upon any individualized suspicion; indeed, it is undisputed that "[a]t the time of the strip search, no corrections officer suspected that T.M. possessed weapons, drugs, or other contraband." ROA.1251. Rather, T.M.'s search was conducted pursuant to a Lee County policy that mandates body cavity searches of all children charged with a violent, theft, or drug offense who would be placed in the general population. Lee County does not appear to offer any specific justification for its policy, beyond a general citation to "penological interests" in the safety of children and staff. The

district court cited a few of the more specific concerns mentioned by the Third Circuit in the *Fassnacht* decision, explaining that "[m]inors may 'represent the same risks to themselves, staff, and other detainees as adults [and] may carry lice or communicable diseases, possess signs of gang membership, and attempt to smuggle in contraband.'" ROA.1256 (quoting *J.B. v. Fassnacht*, 801 F.3d 336, 342 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1462 (Mar. 21, 2016) (No. 15-903)) (alteration in original). None of these concerns are sufficient to justify the suspicionless body cavity search T.M. experienced.

First, a generalized citation to Lee County's "penological interests" is inadequate to justify a body cavity search of a child. As discussed above, the deferential "legitimate penological interests" standard articulated in *Florence* cannot be mechanically applied to the juvenile context.[3] Juvenile detention serves a fundamentally different purpose than adult detention. By definition, "penological interests" are those that relate to "a penalty or punishment." *See* Black's Law Dictionary (10th ed. 2014). Thus, in light of the rehabilitative mission of the juvenile justice system, the "penological interests" framework is inappropriate in

[3] That standard, which originated with the *Turner v. Safley* decision, provides that, "in the absence of substantial evidence in the record" indicating that prison officials "exaggerated their response" to legitimate security interests, "courts should ordinarily defer to their expert judgment in such matters." *Florence*, 132 S. Ct. at 1517 (internal quotation marks omitted).

this context. *See N.G.*, 382 F.3d at 236 ("[W]e doubt that the strip searches . . . can be upheld under the [penological interests] rationale.").

Furthermore, even in adult strip search cases like *Florence*, the Supreme Court has relied heavily on actual evidence justifying the security concerns. For example, in *Florence*, the Court discussed instances where "[c]orrectional officers have had to confront arrestees concealing knives, scissors, razor blades, glass shards, and other prohibited items on their person, including in their body cavities," as well as examples of low-risk inmates being "caught smuggling prohibited items into jail." *Florence*, 132 S. Ct. at 1518-20. The Court emphasized that the record had "concrete examples" showing that "people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment." *Id.* at 1520-21. Similarly, the Court in *Bell v. Wolfish* noted that "inmate attempts to secrete [money, drugs, weapons, and other contraband] into the facility by concealing them in body cavities are documented in this record." 441 U.S. at 559.

Neither the district court nor Lee County mention any such evidence here. In contrast to *Florence* and *Bell*, there is simply no evidentiary support for the proposition that 12-year-olds accused of minor offenses pose a risk of smuggling weapons, drugs, or other contraband into detention facilities by concealing them in their body cavities. Under such circumstances, the state cannot be permitted to use

"legitimate penological interests" as magic words that render all searches—no matter how intrusive—constitutionally unassailable.

That is especially true where, as here, there are other measures that the facility can—and did—take to protect its safety and security interests. Although a search need not be the "least intrusive means" of effectuating the government's interest, there must be a "close and substantial relationship" between the intrusiveness of the search and the government's need for invading an individual's privacy without a warrant. *United States v. Lifshitz*, 369 F.3d 173, 184, 186 (2d Cir. 2004). The Supreme Court has held that, in determining the nature of the governmental interests, courts should assess the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663. Thus, a search that is not well-designed to effectuate its purpose weighs against a finding of constitutionality. *See Chandler v. Miller*, 520 U.S. at 319.

Here, all youth entering the facility were searched using a metal detector wand and patted down. They were also required to shower and use delousing shampoo. These efforts, which are significantly less intrusive than a strip search, greatly reduce the risk that youth might "carry lice or communicable diseases" or "attempt to smuggle in contraband.'" *See J.B. v. Fassnacht*, 801 F.3d 336, 342 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1462 (Mar. 21, 2016) (No. 15-903). Indeed, that level of search is all that many youth entering this particular facility receive, as

only those charged with certain offenses receive the additional strip search.[4] Making the "quantum leap" from those less invasive searches "to exposure of intimate parts" demands some additional justification showing the relationship between that search and the purported interest it serves. *See Safford*, 557 U.S. at 377 (concluding in the school context that "[t]he meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions"). More particularly, given the absence of any evidence demonstrating that children charged with minor offenses pose a risk of secreting contraband in their body cavities, some level of individualized suspicion was needed to justify a search of that level of invasiveness.[5]

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[4] Although Lee County's policy does not require strip searches for youth charged with status offenses, it does include many low-level offenses, including the undeniably minor offense that T.M. was charged with.

[5] The *Florence* Court's concern that requiring individualized suspicion would be "unworkable" is inapplicable in the juvenile context. The Supreme Court has previously recognized that the intake process of juvenile detention centers is categorically distinct from the intake procedures in adult jails. *Schall*, 467 U.S. at 265-68. While it may be especially difficult to classify adult inmates at intake, *Florence*, 132 S. Ct. at 1520-22, such classifications are a routine component of the juvenile detention process. Additionally, the low rate of juvenile detention—just over 200,000 youth are detained annually—stands in stark contrast to the 13 million adults admitted each year to jail. *See* National Center for Juvenile Justice & Office of Juvenile Justice and Delinquency Prevention, *Juvenile Court Statistics 2013*, http://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2013.pdf at 32. Moreover, many youth detention facilities house 50 or fewer youth, and detention centers with bed capacities of 20 or less are common. Melissa Sickmund, et al., *Easy Access to the*

The lack of individualized suspicion of the instant search is particularly concerning in light of the lack of due process T.M. received. As the Supreme Court explained in *New Jersey v. T.L.O.*, "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where . . . 'other safeguards' are available" to protect against abuse. 469 U.S. at 342 n.8. In his concurrence in *Florence*, Justice Alito expressed similar concerns about strip searches prior to judicial detention determinations. He emphasized that "the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer," and he noted that "[m]ost of those arrested for minor offenses are not dangerous," many are quickly released from custody, and "[i]n some cases, the charges are dropped." *Florence*, 132 S. Ct. at 1524. These cautionary statements recognize that an individual held in detention after arrest but prior to a judicial detention hearing is in a uniquely vulnerable position: she has not yet received key procedural protections, but may still face significant harms.

T.M.'s case implicates precisely these concerns. Although a judicial designee approved T.M.'s initial detention, she did not in fact meet Mississippi's

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Census of Juveniles in Residential Placement, available at http://www.ojjdp.gov/ojstatbb/ezacjrp/. These facilities are simply not processing hundreds of individuals per day like the adult jails described in *Florence*.

statutory criteria for detention, as no finding was made that custody was "necessary" and that there was "no reasonable alternative to custody." *See* Miss. Code Ann. § 43-21-301(3)(a) & (b). Furthermore, it is undisputed that no officer involved in this case ever thought she was a threat to herself or to others. Like the hypothetical adult detainees described by Justice Alito in his concurrence in *Florence*, she was never adjudicated delinquent, and all charges were dropped. In fact, her entire exposure to the juvenile justice system lasted only a couple hours. Yet, ironically, in that limited time she was subjected to an extremely invasive search that has the potential to cause long-lasting harm.

Finally, the search cannot be rendered constitutional simply by reference to the state's duty to protect children in its care. While the Supreme Court has made clear that different standards can, and should, be applied to youth, it has also warned against inflicting harm on youth in the name of protection. *See, e.g.*, *Kent v. United States*, 383 U.S. 541, 555 (1966) ("[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."); *see also In re Winship*, 397 U.S. 358, 365-66 (1970) ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards.").

In sum, blanket policies providing for suspicionless strip searches of children charged with minor offenses—and the exceptionally invasive body cavity search of T.M.—extend far beyond what the Fourth Amendment allows.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court reverse the district court.

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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25, 5th Cir. R. 25, and 5th Cir. I.O.P. 25, I hereby certify that on this 6th day of July, 2016, I electronically filed the foregoing *Amicus* Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

I further certify that the following are registered CM/ECF users and will be served via the CM/ECF system:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 and 32, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 6, 984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2. This brief was prepared using Microsoft Word Times New Roman font.

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